Nos. 83-1065 and 83-1240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE COUNTY OF ONEIDA, NEW YORK, and
THE COUNTY OF MADISON, NEW YORK,
Petitioners,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF C. H. ALBRIGHT AND OTHER SOUTH CAROLINA LANDOWNERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

This brief is filed on behalf of forty-six private landowners [1] who are named defendants in a lawsuit brought

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[1] The named defendants and successors thereto who have joined in this brief include:

C.H. Albright, Ned M. Albright, David G. Anderson, Mrs. Jessie G. Anderson, John W. Anderson, Jr., John Wesley Anderson, W.B. Ardrey, Jr., Ardrey Farms, Ashe Brick Company, F.S. Barnes, Jr., Bowater Inc., Archie B. Carroll, Jr.,

in 1980 in the District Court of South Carolina by the so-called "Catawba Indian Tribe, Inc." ("the Catawbas").[2] The Catawbas seek to avoid an 1840 transaction[3] between the Catawbas and the State of South Carolina and to be declared the owners of approximately 144,000 acres (225 square miles) of land now inhabited by many thousands of non-Indians. The Catawbas contend that the Trade and Intercourse Act[4] required federal approval or consent to the 1840 Treaty and that such federal approval or consent was lacking. In a manner similar to the *Oneida* case herein, the Catawbas allege that the violation of a single federal statute gives them the right to land which is now held by many thousands of persons who were completely uninvolved in the alleged violation and who relied upon the title of the state of South Carolina in making their purchases.

Celanese Corp., Close Family Real Estate Trust, Duke Power Co., R.A. Fewell, Jane Nisbet Goode, Mrs. Elizabeth Grimball, Mrs. Pauline B. Gunter, Annie F. Harris, T.W. Hutchison, Francis M. Mack, Jr., J.E. Marshall, Elizabeth N. Martin, Mary T. McCorkle, W.A. McCorkle, Jr., Nisbet Farms, Inc., W. Oliver Nisbet, W. Olin Nisbet, III, Mary Nisbet Purvis, Rebecca N. Rencher, John S. Simpson, Robert T. Simpson, William R. Simpson, Jr., Thomas B. Snodgrass, Jr., Southern Railway, Springland Inc., Springs Mills, Inc., TCU, Inc., TC126 Inc., Tega Cay Recreation Company, Inc., Wachovia Bank and Trust Company, Marshall E. Walker, Eugenia N. White, Hugh M. White, Jr., Robert T. Yoder.

[2] Consent for the filing of this *amicus curiae* brief has been received from the parties. Copies of the consents have been filed with the Court.

[3] The Catawbas allege that they occupied the land in issue "from time immemorial" and that their ownership was recognized and confirmed by treaties with Great Britain in 1760 and 1763. The Catawbas concede that by the 1830's nearly all of the land at issue had been leased to non-Indians. In 1840 the Catawbas transferred any interest they held in the land at issue to the State of South Carolina by the Treaty of Nation Ford, March 13, 1840, the South Carolina Archives, Misc. Records Book N, at 236. Neither the 1760 nor 1763 treaty prohibited the Catawbas from entering into the 1840 Treaty of Nation Ford.

[4] Now codified in part at 25 U.S.C. § 177.

These *amici curiae* have a critical interest in the pending case. The South Carolina landowners face the same threat of losing their land as do the inhabitants of Oneida and Madison Counties.[5] Indeed, the *amici* may be in more immediate jeopardy than the petitioners in this appeal. The Catawbas have not styled their litigation as a "test case" and have not limited the relief sought to damages for a relatively short period of time. They have brought their case in South Carolina as a defendant class action seeking ejectment of thousands of people from land that defendants and their predecessors have owned for at least 140 years. The Catawbas seek to destroy the land titles of these thousands of South Carolina citizens and to recover trespass damages from 1840 to the present time.

The land in issue in the *Catawba* case lies at the northern border of South Carolina in York, Lancaster and, perhaps, Chester Counties. It encompasses the city of Rock Hill, the town of Fort Mill, and a number of smaller communities, and is divided into thousands of separate tracts. The Catawbas' complaint names seventy-six individuals, companies and public entities as defendants and as representatives of an uncertified putative defendant class alleged to consist of more than 27,000 "persons who assert an interest in any portion of the subject lands." Potential class members include thousands of families, stores, warehouses, railroads, farmers, churches, charitable organizations, lending institutions, manufacturers, public utilities, local governments and the state of South Carolina.

The named defendants moved to dismiss the Catawbas' complaint in the District Court on the grounds that a 1959 federal statute commonly referred to as the "Catawba termination act"[6] had profoundly altered the Catawbas' legal status as a tribe able to assert the Trade

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[5] They also face the same counsel. Both the Catawbas and the Oneida Indian Nation of Wisconsin are represented by the Native American Rights Fund.

[6] 25 U.S.C. §§ 931-938.

and Intercourse Act and, as a matter of law, precluded their claim. On June 14, 1982, Senior District Judge Joseph P. Willson, sitting by designation, granted the defendants' motion for summary judgment and dismissed the action.[7] The court held that the Catawba termination act barred the plaintiff's claim under the Trade and Intercourse Act.

On appeal, the Fourth Circuit, in a two-to-one opinion, reversed.[8] The Circuit Court held that the 1959 Act "did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Nonintercourse Act, or make the state statute of limitations applicable to the Tribe's claim."[9] In a strong dissent, Circuit Judge Hall found that the 1959 Act terminated the trust relationship between the United States and the Catawbas thereby making it impossible for the plaintiffs to establish a *prima facie* case under the Trade and Intercourse Act and thereby rendering the state statute of limitations applicable.[10] On December 20, 1983 the Fourth Circuit granted the defendants' motion for a rehearing *en banc.* That hearing was held on June 4, 1984.

If the Fourth Circuit does not sustain Judge Willson's interpretation of the Catawba Termination Act and remands the case to the District Court, then the legal issues raised on this appeal would be most relevant in *Catawba.* Thus, whether the Catawbas have a private right of action under Section 177 of the Trade and Intercourse Act; whether statutes of limitation and principles of abandonment and laches apply to the claim; whether Congress has through subsequent conduct ratified the questioned treaty; and, whether a case of this sort raises non-justiciable political questions, could have a direct and

[7] Catawba Indian Tribe v. South Carolina, No. 80-2050 (D.S.C. June 14, 1982).

[8] Catawba Indian Tribe v. South Carolina, 718 F.2d 1291 (4th Cir. 1983).

[9] *Id.* at 1300.

[10] *Id.* at 1301-03.

immediate bearing on the ability of many thousands of people to remain on their land.

SUMMARY OF ARGUMENT

Several courts, including the District Court and Court of Appeals in the *Oneida* case, have held that tribal land claims are not barred by the passage of time. However, this view does not find support in the Court's decisions. On the contrary, two lines of cases based on the concepts of abandonment and laches demonstrate that this claim should be barred in accord with a fundamental premise of American jurisprudence that rights become fixed after long periods of time. Abandonment applies because these Indians have long ago given up their right of occupancy to the land in question thereby causing absolute title to vest in the current fee owners. The doctrine of laches applies because the tribes have for many years ignored any right they may have had to sue for recovery of the land.

Any failure of the United States to supervise the 1795 Treaty has been rectified. The Court has held on numerous occasions that the United States can at a later date ratify earlier Indian land conveyances. Such ratification need not be "plain and unambiguous" but can be derived from a variety of sources. Here the subsequent jurisdictional history of the land, the changes in population and actual knowledge of the events by the United States demonstrate ratification.

Finally, these cases are not justiciable since they raise questions that must be decided by the political branches of government. The decision whether to enforce the Trade and Intercourse Act in any given situation was left to the discretion of Congress and the executive branch and that enforcement decision cannot be assumed by the Court. The substantial problems raised by the relief requested well over one hundred years after the alleged statutory violation can now only be weighed and determined by Congress.[11]

[11] These *amici curiae* are also in full agreement with the positions asserted by the Counties of Oneida and Madison in the brief

ARGUMENT

I. THE ONEIDAS' CLAIM SHOULD BE BARRED BECAUSE IT WAS NOT BROUGHT UNTIL 175 YEARS AFTER THE CONVEYANCE AT ISSUE

A. Introduction

The single most striking feature of Eastern Indian land claims is their antiquity. Virtually without exception, they arise out of transactions that occurred generations ago. Thus, they fall within the class of cases that are normally barred by familiar rules concerning the passage of time. Obviously, the Oneidas cannot deny the antiquity of their claims. What is at issue is the applicability of time-related defenses in these cases.

In *Burnett* v. *New York Central Railroad Co.*,[12] the Court stated the reason for barring claims by the passage of time:

> Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. . . ." [13]

The Court has recognized from the earliest time that these concepts are particularly important in the case of land titles:

> The best interests of society require that causes of action should not be deferred an unreasonable time.

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they have filed with the Court. Thus, these *amici* also contend that the Oneidas do not have a cause of action under federal law, that their claim is barred by the applicable statute of limitations, that actions under the Trade and Intercourse Act of 1793 have abated and that the doctrines of ratification and non-justiciability should be applied as the Counties suggest. These *amici* also support the position asserted by the State of New York concerning the inability of an Indian tribe to assert a right of action under federal common law or pursuant to the Trade and Intercourse Act.

[12] 380 U.S. 424 (1965).

[13] *Id.* at 428, *quoting* Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944).

> This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labour is paralyzed where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals.[14]

The rights of thousands of landowners to their long-held real property depend upon factual issues respecting which it is impossible to produce live witnesses or direct evidence by reason of the 175 year delay in bringing the *Oneida* claim.[15] For this reason, the claims such as are asserted by the Oneidas and other tribes should be barred by the passage of time in the same manner as other claims.

While a number of lower courts, including the District Court and the Court of Appeals in this case,[16] have held that such claims are not barred by the passage of time, this view is not supported in the opinions of the Court. On the contrary, two lines of decisions relating to abandonment and laches demonstrate that the Oneidas' claims should be barred by the long delay in their attempted enforcement.

The decisions of the Court relating to abandonment and laches are relevant in the present case for two reasons: (1) they establish that Indians are not exempt from the loss of claims by reason of their failure to assert such claims for a long period of time and, therefore, there is no reason to exempt Indians from the appropriate statute

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[14] Lewis v. Marshall, 30 U.S. (5 Pet.) 470, 477-78 (1831). *See also*, Teall v. Schroder, 158 U.S. 172, 179 (1895); Leffingwell v. Warren, 67 U.S. (2 Black) 599, 605-06 (1862).

[15] For example, the trial court below relied upon the testimony of an anthropologist to conclude that "no United States commissioner was present . . . when the State purchased [the] land. . . ." Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 535 (N.D.N.Y. 1977) (J.A. 58a).

[16] Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 542 (N.D.N.Y. 1977) (J.A. 45a), *aff'd*, 719 F.2d 525, 537-38 (2d Cir. 1983) (J.A. 207a).

of limitations which would have otherwise barred their claim more than 150 years ago;[17] and (2) the doctrines of abandonment and laches, as distinguished from the statute of limitations, may be applied directly in the present case to bar the claim of Oneidas.[18]

B. The Claim of the Oneidas Has Been Abandoned

The doctrine of abandonment is a time-related defense based upon the nature of Indian title. Under decisions of the Court, Indians held a right to occupy and did not hold fee title to their aboriginal lands. In the thirteen original states, the fee to Indian property was in the states and could be transferred, subject to the Indians' right of occupancy. The present-day defendants derive their title from the states and, therefore, the conveyance by the states conveyed the fee title subject to any Indian right of occupancy. This right of occupancy was lost if the Indians no longer occupied the land for a period of time. They were considered to have "abandoned" the land in that situation. Since the Oneidas have been out of possession of the land in issue for at least 175 years, their right of occupancy has been abandoned and the fee interests of the present owners are not burdened by any Indian rights. Significantly, the acquisition of "absolute title" by a fee holder as a result of such abandonment does not require the approval of the United States.

The landmark case of *Johnson* v. *McIntosh*[19] defined the nature of Indian tribes' interest in land as follows:

> [I]ndian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in

[17] In an effort to avoid repetition, the applicability of state statutes of limitation is not addressed in this Brief. The issue is fully addressed in the brief of Petitioners County of Oneida and County of Madison.

[18] These defenses were asserted in the pleadings in the present case. Abandonment and laches were discussed by the District Court. Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 541-42 (N.D.N.Y. 1977) (J.A. 71a-72a).

[19] 21 U.S. (8 Wheat.) 543, 591 (1823).

> the possession of their lands, but to be deemed incapable of transferring the absolute title to others.

In *Fletcher* v. *Peck*,[20] the Court recognized that the thirteen original states held the fee subject to any Indian right of occupancy and this fee could be conveyed by the states. *Fletcher* v. *Peck* involved land located in Georgia which had been transferred by the state prior to the termination of the Indian tribe's right of occupancy. The Court said:

> It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.
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> The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.[21]

In *Johnson* v. *McIntosh*,[22] the Court recognized that the grants of a fee to Indian land "have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."

It has long been recognized by the Court that upon abandonment, the right of possession attaches itself to the fee without further grant. The title of the fee owners is complete without any conveyance that could or would violate the provisions of the Trade and Intercourse Acts. For example, in *United States* v. *Cook*,[23] the Court held

[20] 10 U.S. (6 Cranch) 87 (1809).

[21] *Id.* at 142-3. In its previous decision in this case, the Court recognized that the fee to the real estate had been in the state of New York. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974).

[22] 21 U.S. (8 Wheat.) 543, 574 (1823).

[23] 86 U.S. (19 Wall.) 591, 593 (1873). *See also* United States v. Fernandez, 35 U.S. (10 Pet.) 303, 304-05 (1836); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

that "[t]he possession, when abandoned by the Indians, attaches itself to the fee without further grant." Thus, even if a cession or transfer would be within the terms of the Trade and Intercourse Acts, there is no prohibition in these Acts against the loss of the right of occupancy by abandonment.

The doctrine of abandonment was applied by the Court in a case that has direct bearing on this and other tribal claims. In *Williams* v. *City of Chicago*,[24] the Indian tribe attempted to recover immensely valuable land which had been physically reclaimed from beneath Lake Michigan. The Court held that the tribe had no interest in the real estate because of the doctrine of abandonment and that the present owners of the fee held it free of the Indian right of occupancy:

> The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own in 1795 was that of occupancy. *Johnson* v. *McIntosh*, 8 Wheat, 543. If in any view it ever held possession of the property here in question we know historically that this was abandoned long ago and that for more than a half century it has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.
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> * * * *
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> [W]hen this [right of continued occupancy] was abandoned all legal right or interest which both tribe and its members had in the territory came to an end. *Johnson* v. *McIntosh*, 8 Wheat. 543, 584, 586, 588; *Mitchel* v. *United States*, 9 Pet. 711, 745; *United States* v. *Cook*, 19 Wall. 591, 592; *Beecher* v. *Wetherby*, 95 U.S. 517, 525.[25]

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[24] 242 U.S. 434 (1917).

[25] *Id.* at 437. The District Court in Oneida Indian Nation v. County of Oneida, 434 F. Supp. at 541 (J.A. 71a) acknowledged that the Indians' right of occupancy could be lost through abandonment but attempted to distinguish the *Williams* case by stating:

> The small area of land [the Oneidas] now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today.

These purported distinctions have no validity. First, the Oneidas' retention of a small area does not show any intention to retain a huge area that they have not occupied for 180 years. Rather, the move to a smaller area shows an intention to limit the area occupied by the tribe. *See* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 356-58 (1941). Second, as the District Court acknowledged, 434 F. Supp. at 536 (J.A. 60a), the earliest claim by the Oneidas to the land in question was in 1840, and this claim could not be documented. This was approximately the same delay as the half century found significant by the Court in the *Williams* case.

On April 17, 1984 the Court in *Summa Corp.* v. *California*[26] reaffirmed that Indian tribes could lose their right of occupancy through abandonment. The Court cited, quoted and relied upon the cases of *Barker* v. *Harvey*,[27] and *United States* v. *Title Insurance and Trust Co.*[28] Both of those cases involved a 1851 statute which provided for the adjudication of land claims. The statute provided that tribal claims to real estate must be presented before a commission within a period of two years or were to be regarded as abandoned. In *Barker*, the Court held that the tribes' failure to present their claims constituted abandonment.[29] In *Title Insurance and Trust Co.*, the Court reaffirmed *Barker* and approved the lower court's finding that the Indians' claim was "abandoned and lost" and that the contested patent "passed the full title, unencumbered by any right in the Indians."[30]

The very recent reaffirmation of these cases by the Court clearly establishes that an Indian tribe can abandon its claim to the right of occupancy. These Indians manifested an intent to leave the land on numerous occasions, some instances of which had the explicit approval

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[26] 104 S.Ct. 1751, 1757 (1984).

[27] 181 U.S. 481 (1901).

[28] 265 U.S. 472 (1924).

[29] Barker v. Harvey, 181 U.S. at 491-92.

[30] United States v. Title Insurance and Trust Co., 265 U.S. at 482.

of the United States. Further, such abandonment did not require the consent of the United States and was not forbidden by the Trade and Intercourse Acts.[31] In addition, the doctrine of abandonment rests on the sound policy ground of promoting the stability of land titles thereby strongly supporting the defendants in this and other land claim cases.[32]

C. The Claim of the Oneidas is Barred Under The Doctrine Of Laches

The Court has also long held that the federal doctrine of laches is applicable to Indians. The application of laches is not dependent upon any state statute of limitations or rigid deadline. As the Court has stated, laches is based upon fundamental principles of justice:

> The defense [of laches] itself is one which, wisely administered, is of great public utility, in that it

[31] *See* Joint Tribal Council v. Morton, 528 F.2d 370, 380-81 (1st Cir. 1975).

[32] The Court in *Summa Corp.* explained *Title Insurance and Trust Co.* in a manner that shows particular sensitivity to long-established land titles:

> The Court declined an invitation to overrule its decision in *Barker* because of the adverse effect of such a decision on land titles, a result that counseled adherence to a settled interpretation.

104 S.Ct. at 1757, *citing* United States v. Title Insurance and Trust Co., 265 U.S. at 486. The language discussing the rule of abandonment used by the Court in *Title Insurance and Trust Co.* and cited with approval in *Summa Corp.* is also instructive:

> The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results.

265 U.S. at 486. *See also* Arizona v. California, 103 S.Ct. 1382, 1392 (1983).

> prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same time it certainly works in furtherance of justice . . . . We have had before us lately several cases in which this defense has been presented, and in which the rules determining it have been fully stated and its value clearly demonstrated. *Hamond* v. *Hopkins*, 143 U.S. 224, and cases cited in the opinion; *Felix* v. *Patrick*, 145 U.S. 317; *Foster* v. *Railroad Co.*, 146 U.S. 88; *Johnston* v. *Mining Co.*, 148 U.S. 360. The length of time during which the party neglects the assertion of his rights which must pass in order to show laches varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule.[33]

If the Indians ever had any legal right to prosecute their claim to the land at issue, that claim is now time barred.

The leading case in this Court applying laches to an Indian land claim is *Felix* v. *Patrick*.[34] In that case, the defendant's predecessor in title had obtained script from a half-blood Indian entitling him to purchase land. There was a federal statute expressly providing that "no transfer or conveyance of such script should be valid." The half-blood Indian, Sophia Felix, continued to be a tribal Indian until 1887, when she became a citizen. The land ultimately became a part of the city of Omaha and greatly increased in value. The Court held that the Indian heirs of Sophia Felix who attempted to claim the land were barred by the doctrine of laches:

> In reply to this defense of laches, plaintiffs rely mainly upon the fact that Sophia Felix and her heirs were at the time, and continued to be until

[33] Halstead v. Grinnan, 152 U.S. 412, 416-17 (1894). For a more recent example of the application of the doctrine of laches, *see* Indep. Bankers Ass'n of America v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980).

[34] 145 U.S. 317 (1892).

> 1887, tribal Indians, members of the Sioux nation, residing upon their reservation in the State of Minnesota, and incapable of suing in any of the courts of the United States.
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> But their very analogy to persons under guardianship suggests a limitation to their pupilage, since the utmost term of disability of an infant is but 21 years, and it is very rare that the relations of guardian and ward under any circumstances, even those of lunacy, are maintained for a longer period than this.[35]

Thus, the Court indicated that laches would start to run when Sophia Felix was able to sue on her own behalf.[36]

The *Felix* case demonstrates that laches starts to run once the Indians or Indian tribes have access to the courts to enforce their claims. The Court has long recognized the right of tribes to assert any claims they may have to enforce their interests in land.[37] In *Creek Nation* v. *United States*,[38] the Court said:

> The tribes have not yet been dissolved, and they have had, both as a general legal right and by virtue of the very section of the 1906 Act under discussion here, the power to bring actions on their own behalf. That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions.

[35] 145 U.S. at 330-31. *See also*, Schrimpscher v. Stockton, 183 U.S. 290 (1902).

[36] A recent Indian land claim case discussing *Felix* is Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780, 785 n. 7 (D. Conn. 1976) in which the district court held that laches did not apply to an Indian tribe. The court attempted to distinguish *Felix* on the basis of the extraordinary relief demanded in that case. Of course, in the present tribal land claims the attempt to recover hundreds of thousands of acres after so many years is certainly a request for "extraordinary" relief.

[37] These *amici* do not concede in any way that the Oneidas had any statutory or common law right to enforce this claim. As a result, this argument is suggested only in the event the Court reaches a contrary result on that issue.

[38] 318 U.S. 629, 640 (1943). *See also*, Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919); Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 652 (1890).

Thus, the respondents in the present case and the plaintiff tribes in the many pending claims have long had access to the courts to assert the theories they now present in this case. This failure to bring an action should bar the claims by reason of laches.

The opinion of the Court primarily relied upon by lower courts to hold that laches and other time-related defenses do not apply to Indian tribes is *Ewert* v. *Blue Jacket*.[39] In *Ewert*, an individual Indian sued to set aside a transfer of land to an employee of the federal Indian Affairs Department who was prohibited by statute from purchasing land from Indians. The Court found the claim of the plaintiff not to be barred by laches.

Ewert is distinguishable since there the defendant had participated in the illegal act and was attempting to take advantage of laches. *Ewert* is simply a traditional application of the doctrine that only one acting in good faith should be able to take advantage of laches.[40] This is confirmed by the Court's action in requiring the defendant to indemnify the plaintiff against payment of the mortgage.[41] The Court obviously assumed that the plaintiff Indian, after recovering the land, would have to pay the mortgage to prevent foreclosure. The Court thereby held that the mortgage was a valid and enforceable lien

[39] 259 U.S. 129 (1922). *Ewert* was relied upon by the District Court in this case. Oneida Indian Nation v. County of Oneida, 434 F. Supp. at 542 (J.A. 73a). *See also*, Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780, 784 (D. Conn. 1976); Narragansett Tribe v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798, 804-05 (D.R.I. 1976).

[40] Wagg v. Herbert, 215 U.S. 546, 552-53 (1910); McIntire v. Pryor, 173 U.S. 38, 54 (1899).

[41] Ewert v. Blue Jacket, 259 U.S. at 138.

and that the mortgagee, who was an "innocent" party, could have pleaded laches against a claim by the plaintiff Indians. The present-day defendants in the tribal land claim cases, who have acquired their interest in land in good faith, should also be able to invoke the doctrine of laches.

The district court below demonstrated a fundamental misunderstanding of *Ewert* by stating that "[i]f a transfer of Indian land is void under federal law, *see, e.g.*, 25 U.S.C. § 177, it cannot later be made valid by operation of state law."[42] This statement is clearly not supported by *Ewert* or any other opinion of the Court. Laches may be applied even if the transfer "is void." In *Felix*, for example, the statute expressly provided that the transfers were void yet the Court found the Indians' claims barred by laches.[43] Further, the recognition of laches in *Felix* is altogether independent of any "state law" and can be applied by all courts.

II. THE UNITED STATES RATIFIED THE 1975 CONVEYANCE TO NEW YORK

A major element of proof in a case brought under the Trade and Intercourse Act is to demonstrate the United States never approved or consented to the challenged transfer.[44] At issue in this case is what standard must be applied to determine if the necessary federal scrutiny has ever been given to what was otherwise an appropriate transfer of land in 1795 from the Oneidas to the

[42] Oneida Indian Nation v. County of Oneida, 434 F. Supp. at 542 (J.A. 73a), *citing Ewert*.

[43] Further, as discussed *supra* pp. 8 to 10, the title of the present owners does not depend upon any transfer of the fee by the Indians. The present land owners hold their fee title independently of any transfer by the Indians.

[44] Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979). *See also*, Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); Narrangansett Tribe v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798, 803 (D.R.I. 1976) *citing* Joint Tribal Council v. Morton, 528 F.2d 370 (1st Cir. 1975).

state of New York. The Second Circuit, citing language in *United States* v. *Santa Fe Pacific Railroad*,[45] held below that for such ratification to be found it must be shown to have been "plain and unambiguous."[46] The Second Circuit misapplied *Santa Fe* and understated the variety of ways in which the Court has found the necessary congressional ratification of transactions with Indian tribes.

There are no artificial requirements concerning the time and manner of congressional consent to Indian land transfers. Consent can be found not only in "plain and unambiguous" federal action contemporaneous with the transfer, but also in legislation preceding and authorizing the transfer,[47] in a general act, the circumstances of whose enactment demonstrate consent,[48] or in a statute enacted many years after the transfer which recognizes the occurance or effect of the transfer.[49] Moreover, congressional ratification of a disputed transfer of Indian land need not be explicit.[50] It is well established that later congressional action confirming the effect of a disputed transfer or mere congressional acquiescence in the transfer can constitute ratification.[51]

[45] 314 U.S. 339, 354 (1941).

[46] Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 539 (2d Cir. 1983) (J.A. 236a).

[47] *E.g.*, United States v. National Gypsum Co., 141 F.2d 859, 863 (2d Cir. 1944).

[48] *E.g.*, Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735; Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-1716.

[49] *See, e.g.*, Seneca Nation v. United States, 173 Ct. Cl. 912 (1965). *See also*, Buffalo, Rochester & Pittsburg R.R. Co. v. Lavery, 27 N.Y.S. 443 (App. Div. 1894), *aff'd on opinion below*, 149 N.Y. 576, 43 N.E. 986 (1896).

[50] *See* Seneca Nation v. United States, 173 Ct. Cl. 912, 915 (1965). *See also* Seneca Nation v. Christy, 126 N.Y. 122, 146, 27 N.E. 275, 282 (1891), *writ of error dismissed on other grounds*, 162 U.S. 283 (1896).

[51] Joint Tribal Council v. Morton, 528 F.2d 370, 380-81 (1st Cir. 1975).

Ascertainment of consent can include examining the conduct of the federal government over the years. For example, in *Shoshone Tribe* v. *United States*,[52] Justice Cardozo looked to a course of governmental conduct as retroactively validating the occupancy by the Arapaho Indians of a portion of the Shoshone reservation. This occupancy had occurred over a number of years with the acquiescence of the United States. What was at issue in *Shoshone* was the proper valuation date to apply to the "tortious" taking of the Shoshone lands by the placement of the Arapahoes on their reservation. The choices included 1878, the date when the Arapahoes first came on the land; 1891, the date when the Commissioner of Indian Affairs made a public statement in support of the Arapaho occupation; and 1927, the date when Congress passed a jurisdictional act. The Court held that by relation back, 1878 was the taking date:

> Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy of the Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States *through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong,* adopting the *de facto* appropriation by relation as of the date of its beginning.[53]

In recent years there has been a clear trend by the Court toward finding the loss of an Indian tribe's interest in reservation land from the "surrounding circumstances" and legislative history.[54] For example, in *Rose-*

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[52] 299 U.S. 476 (1937).

[53] *Id.* at 495 (emphasis supplied). *See also,* United States v. Northern Paiute Nation, 490 F.2d 954, 958 (Ct. Cl. 1974).

[54] Mattz v. Arnett, 412 U.S. 481, 505 (1973). *Accord,* Solem v. Bartlett, 104 S.Ct. 1161 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975).

bud Sioux Tribe v. *Kneip*,[55] the Court considered the effect of three Acts of Congress that opened for settlement various parts of a reservation which had originally been established by treaty in 1894. The Court held that the "mere fact" that a reservation had been opened to settlement does not necessarily mean that the opened area lost its reservation status; "the face of the Act," the "surrounding circumstances," and the "legislative history," all can "clearly evidence congressional intent to diminish the boundaries of the . . . Reservation."[56] In reaching its conclusion, the Court considered the "jurisdictional history" of the land at issue subsequent to the events complained of; that is, the extent to which various state and federal authorities treated the land as being outside of the reservation:

> [T]he single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands . . . since the passage of the 1904 Act . . . .[57]

In a case decided this term, *Solem* v. *Bartlett*,[58] the Court stated that what subsequently takes place on the land is most useful in ascertaining the requisite intent to disestablish a reservation:

> On a more pragmatic level, we have recognized that *who actually moved onto opened reservation lands is also relevant* to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian

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[55] 430 U.S. 584 (1977).

[56] *Id.* at 587. *See also,* DeCoteau v. District County Court, 420 U.S. 425, 445 (1975).

[57] 430 U.S. at 603. Conversely, the Court also found that the fact that neither Congress nor the executive sought to exercise authority over the land was "entitled to weight as a part of the jurisdictional history." *Id.* at 604.

[58] 104 S.Ct. 1161 (1984).

> character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. [citations omitted]. In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.[59]

The *Rosebud* and *Solem* cases are particularly instructive here. The history of the Oneida Indian reservation from the time of the 1795 treaty up to the final treaty in 1846 demonstrates a pattern of turning over Indian land to state control which has been consistent since the time of the treaty. The population of the entire area has clearly taken on a non-Indian character and the federal government has not objected to the presence of its current inhabitants. There is no evidence that the federal government has ever formally challenged New York's authority over this land.

The fact that the United States knowingly allowed the land in question to remain in the possession of the successors-in-interest to the state of New York is itself proof that the requirements of the Trade and Intercourse Act have been met. In *United States* v. *Creek Nation*,[60] a portion of land in which the Indian tribe claimed an interest had been patented to various settlers. The Court held that a compensable taking had occurred, the United States having disposed of the land by the issuance of patents to non-Indians. In so holding, the Court found that the taking had occurred when the United States, with knowledge of the facts, confirmed the issuance of the patents by permitting them to stand uncancelled:

> Plainly the United States would have been entitled to a cancellation of the disposals had it instituted

[59] *Id.* at 1167 (emphasis added) (citations omitted).

[60] 295 U.S. 103 (1935).

> suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. *In this way the United States in effect confirmed the disposals* . . . .[61]

The above language speaks directly to the major factual elements of this case. The United States could have sued or taken other action to render the 1795 transaction with the state a nullity and thereby to maintain the Indians' right of occupancy.[62] It is quite clear here that the United States was specifically afforded "full knowledge of the facts" and took no legal steps to set aside the transfer. The District Court found below that in 1795 Secretary of War Pickering ordered the local Indian Superintendent, Israel Chapin, Jr., to speak to the Oneidas to convince them not to enter into the disputed sale. Chapin made contact with the Indians and informed them of the government's opposition to the sale. According to the District Court, "Chapin was [then] instructed to leave matters as they stood." The sale was concluded shortly thereafter.[63] It should also be emphasized that the challenged sale was not an isolated example of an obscure transfer of a small parcel of land affecting a handful of current land owners.[64] The land in question was transferred as one of a series of treaties that took

[61] 295 U.S. at 110 (emphasis added).

[62] Federal Power Comm. v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960) ("The obvious purpose of [§ 177] is to . . . enable the Government acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent."). *See also*, United States v. Sandoval, 231 U.S. 28, 46-48 (1913).

[63] Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 534-35 (N.D.N.Y. 1977) (J.A. 54a-57a).

[64] Disestablishment has been found to occur in situations involving two parcels in a relatively small reservation. *See* Pechanga Band v. Kacor Realty, Inc., 680 F.2d 71 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 817 (1983).

place over a period from 1795-1846.[65] Both Congress and the executive branch had knowledge of the Oneidas' treaties with New York from the time of their very occurance.[66] As in *Creek Nation*, the United States "permitted the disposals to stand," allowed the state and its successors in interest to remain in possession of the land and thereby confirmed the entire 1795 transaction.[67]

The lower court's simplistic reliance upon a misapplied phrase in *Santa Fe* should be reversed.[68] While the

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[65] The Indian Claims Commission has held that the United States "had constructive knowledge of all of the 23 treaties, and probably had actual knowledge of most of them." Oneida Indian Nation v. United States, 43 Ind. Cl. Comm. 373, 375 (1978). The Indian Claims Commission also found that the federal government was specifically informed of the very cession that is the subject of this litigation. *Id.* at 418.

[66] The Second Circuit has itself acknowledged that the United States made subsequent references to the 1795 treaty with the State in its treaty with the Oneidas of June 1, 1798. Oneida Indian Nation v. County of Oneida, 719 F.2d at 539 (J.A. 235a-36a). The Second Circuit's comment that "[t]here is no evidence that the federal authorities were then aware of any claim of illegality of the prior land sale" begs the question. *Id.* at 539-40 (J.A. 237a). The only "claim of illegality" was the lack of consent. Otherwise the transaction was perfectly legal. The federal recognition and implied ratification of the immediately prior transaction was all that was necessary to eliminate any problem with the 1795 transaction.

[67] *See also*, Confederated Salish and Kootenai Tribes v. United States, 401 F.2d 785, 787-88 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1055 (1969). *Creek Nation* and *Salish* make it clear that the plaintiffs are left, at most, only with a claim against the United States for a wrongful taking. *See generally*, Arizona v. California, 103 S.Ct. 1382, 1396 n. 20 (1983). Such a right was, in fact, provided by the Indian Claims Commission Act and the Oneidas themselves withdrew from taking advantage of that means of recovery.

[68] United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941) was not concerned with the ratification of a transaction in the manner employed in this case. The issue in *Santa Fe* was whether the policy concerning Indian rights in aboriginal land applied to tribes within the Mexican cession. The Court held that a finding that the policy would not apply requires "plain and unambiguous action" by Congress. *Id.* at 346.

Court shows concern for the protection of reasonable tribal interests, it has also demonstrated the need "to see the facts in true perspective [and to] . . . view them in their totality and not in isolation."[69] The Court continues to apply serious historical analysis in these cases and has taken into account the "justifiable exceptions" of current-day land owners in forming its conclusions.[70] The defendants in this and in other Indian land claim cases are surely justified in believing that their titles could not be attacked on the basis of such ancient history and in the face of Congress' clear knowledge of the status of their land.

III. THE ONEIDAS' CLAIM PRESENTS SOLELY A NON-JUSTICIABLE POLITICAL QUESTION

The Trade and Intercourse Act was an attempt by Congress to assert a preeminent role over the conduct of Indian affairs and to express a federal presence in transactions between states and Indian tribes.[71] Although Congress recognized that the Indians had the right to release their right of occupancy to the original thirteen States, it found within the Constitution the right to exercise political authority over such transactions. As noted above, although the executive branch, which was Congress' delegate in these matters, had specific knowledge of the 1795 Treaty and made some attempt to discourage its conclusion, it never enforced the Trade and Intercourse Act so as to set aside the conveyance.[72] This decision not to implement the Trade and Intercourse Act was inherently political. was not subject to the review of

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[69] Shoshone Tribe v. United States, 299 U.S. 476, 495 (1937).

[70] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977). *Cf.* Solem v. Bartlett, 104 S.Ct. 1161, 1171 (1984) (Fact that few homesteaders moved onto the land is a factor in showing reservation not diminished).

[71] *See* Mohegan Tribe v. Connecticut, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

[72] *Supra* pp. 20 to 22.

any court and could not be legally challenged by the Indians. As an exercise of Congress' plenary power over Indian affairs it is not reviewable.

The Court continues to recognize Congress' "paramount power over the property of the Indians." [73] This power is derived "by virtue of [Congress'] superior position over the tribes." [74] Congress has the ability to eliminate reservations or to reduce their boundaries without tribal consent or without payment of compensation.[75] The same power resides in Congress to establish reservations.[76] Here the Indians seek to have the Court impose its power to reestablish a reservation in an area that has been bereft of such a presence for almost 175 years. In so doing, they ask for the most extraordinary form of relief that may have ever been requested of the Court. They seek the ultimate reestablishment of Indian sovereignty over vast populated sections of the United States and the ejectment of tens of thousands of truly innocent people from their homes and businesses.[77] These landowners, who paid for their lands in good faith and without knowledge of any latent Indian land claims, stand to forfeit their land "without just compensation."

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[73] United States v. Sioux Nation, 448 U.S. 371, 408 (1980), *quoting* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

[74] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 155 n. 21 (1982). *See also*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955).

[75] United States v. Sioux Nation, 448 U.S. 371, 382, 383 n. 14 (1980); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 566, 568 (1903). *Cf.* United States v. Creek Nation, 295 U.S. 103 (1935) (compensation dependent upon special congressional act).

[76] *See*, United States v. Midwest Oil Co., 236 U.S. 459, 469-70 (1915).

[77] The establishment of Indian tribal sovereignty over a particular tract of land has obvious political ramifications. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 630-33 (1977) (Marshall, J., dissenting).

Judicial action of the type sought by the Tribes is inappropriate since it assumes rights that the Constitution has reserved for Congress.[78] While in recent years the Court has taken steps to define in clearer terms the applicability of the "political question" doctrine in Indian litigation, it has not eliminated its applicability in cases such as this.[79]

Thus, in *United States* v. *Sioux Nation*,[80] the Court acknowledged that the "Sioux concede the constitutionality of Congress' unilateral abrogation of the Fort Laramie treaty." What was viewed in *Sioux Nation* as justiciable was the *standard* under which Congress was obligated to *compensate* the Indians for the taking once the taking had, in fact, occurred.[81] The actual fact of taking the land was held to be within the sole jurisdiction of Congress. Indeed, in *Sioux Nation* the Court made specific reference to a critical and still valid element of *Lone Wolf*:

> The *Lone Wolf* Court, therefore, was not required to consider the contentions of the Indians that the agreement ceding their lands had been obtained by fraud, and had not been signed by the requisite number of adult males. "[A]ll these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts." [82]

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[78] Morton v. Mancari, 417 U.S. 535, 551-52 (1974). *See generally*, Baker v. Carr, 369 U.S. 186, 215-17 (1962).

[79] *See generally*, Gilligan v. Morgan, 413 U.S. 1, 11 (1973) ("because [the political question] doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise.").

[80] 448 U.S. 371, 413-14 n. 28 (1980).

[81] 448 U.S. at 411 n. 27.

[82] 448 U.S. at 411, *quoting* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903). *See also*, Solem v. Bartlett 104 S.Ct. 1161, 1166 n. 11 (1984) ("At one time, it was thought that Indian consent was

Thus the Court distinguished *Lone Wolf* in its consideration of the political question doctrine on the fact that in *Sioux Nation*, Congress provided a judicial remedy for redress of a moral wrong, and it was only the post-conveyance means of payment that was at issue:

> Fourth, and following up on the political question holding, the *Lone Wolf* opinion suggests that where the exercise of congressional power results in injury to Indian rights, "relief must be sought by an appeal to that body for redress and not to the courts." Unlike *Lone Wolf*, this case is one in which the Sioux have sought redress from Congress, and the Legislative Branch has responded by referring the matter to the courts for resolution . . . . Where Congress waives the Government's sovereign immunity, and expressly directs the courts to resolve a taking claim on the merits, there would appear to be far less reason to apply Lone Wolf's principles of deference. *See* United States v. Tillamooks, 329 U.S. 40, 46 (1946) (plurality opinion).[83]

As for the New York Indians, Congress specifically provided a remedy for any violation of the Trade and Intercourse Act by granting access to the Indian Claims Com-

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needed to diminish a reservation, but in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), this Court decided that Congress could diminish reservations unilaterally.").

[83] Sioux Nation, 448 U.S. at 414. The Court also was clear that the justiciability principles of *Sioux Nation* are applicable only to takings of land where the Indians have "recognized title." *Id.* at 415 n. 29, *citing* Tee-Hit-Ton Indians v. United tSates, 348 U.S. 272 (1955). In *Oneida* and other such land claims there has been no suggestion that the land at issue was recognized title land. Thus, the clear import of the Court's view of its *Sioux Nation* decision is that Congress has an uncontroverted right to dispose of such aboriginal land as it sees fit. *See also*, United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) ("The manner, method and time of such extinguishment [of aboriginal Indian title] raise political, not justiciable, issues."); Beecher v. Wetherby, 95 U.S. 517, 525 (1877) ("[A]ction towards the Indians with respect to their lands is a question of governmental policy . . . .").

mission, a vehicle that these plaintiffs, until recently, have effectively employed.[84]

That the Court should defer to the political branches is also apparent from the very nature of this case and other lawsuits that will be directly impacted by the Court's opinion. Judge Meskill, in his dissent below, characterized the result reached by the majority as:

> a novel proposition of law, with consequences too broad to be established on such shaky grounds. Demands for redress of violations of the Acts are better directed to the other branches of the federal government.[85]

In contrast with the judiciary, the political branches are particularly well-suited to resolve the issues now before the Court. Just as those departments make discretionary decisions about whether to condemn land for public use or whether to provide disaster relief, they can redress age-old claims of injuries, some technical and some egregious, where alleged present-day violators are individually innocent of any wrongdoing. They can weigh the hardships that should and can be borne by diverse segments of our society; they are able to compromise these claims if appropriate. The political branches—if they conclude that the Indian claimants should receive redress—are able to allocate the costs of that relief to society in general.[86] The Oneidas concede as much in their brief opposing the petition for certiorari:

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[84] *See also*, Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977). In that case the Court was careful to preserve areas of Indian affairs that are clearly within Congress' sole prerogative, most specifically under its facts, the power to abrogate. Unlike *Delaware Tribal Bus. Comm.*, we are not concerned with evaluating in either due process or equal protection terms the means chosen by Congress to implement a decision affecting Indian land. The question before the Court is Congress' decision long ago not to return the land at issue to Indian sovereignty.

[85] 719 F.2d at 549 (J.A. 258a).

[86] It is important to emphasize that the Oneida's claims have been presented to, and decided by, the political branches. The

> [I]t is clear that these claims can best be finally resolved through an equitable settlement implemented by an act of Congress. In consultation with the parties, the Congress can better weigh and make a fair adjustment of competing equities than a court of law.[87]

The Court should follow the Oneidas' own suggestion and remit this case to its proper venue.

CONCLUSION

The Indians in this and other land claim cases are attempting to state causes of action for ancient wrongs. They seek relief from thousands of innocent people who purchased their property without any knowledge of the failure to conform with a single federal statute. As stated in a recent Indian land claim decision:

> The Court believes that a great injustice was probably done to some of the [Indians] . . . , an injustice all too typical of the general treatment of those American natives upon whom the white man choose to impose a conqueror's terms. Justice would not be served, however, by wresting those lands away, more than a century later, from equally innocent landowners. To exact retribution on the current landowners for the sins of their great-grandfathers would merely add to injustice, not right it.[88]

Oneidas presented their case at least twice to the President shortly before filing this suit; the President and his "superintendent" made their considered decision to limit government action to the Indian Claims Commission. The Second Circuit's conclusion is thus inconsistent with the view of the executive branch. Ironically, the Oneidas were awarded relief in 1978 by the Indian Claims Commission but then withdrew their claim after their success. *See* Oneida Indian Nation v. United States, 43 Ind.Cl.Comm. 373 (1978).

[87] Brief of Oneida Indian Tribes in Oposition to Petition for Writ of Certiorari, p. 20.

[88] Dennison v. Topeka Chambers Indus. Dev. Corp., 527 F. Supp. 611, 626 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984).

The judgment of the Court of Appeals, insofar as it affirmed the District Court's finding of liability against the Counties, should be reversed.

Respectfully submitted,

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